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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THERESA WILLIAMS,

Plaintiff and Appellant,

v.

ALBERTSON'S LLC et al.,

Defendants and Respondents.

B284651

(Los Angeles County
Super. Ct. No. BC527963)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly J. Fujie, Judge. Affirmed.

Law Offices of Lee C. Arter, Lee C. Arter and Steven M. Karp for Plaintiff and Appellant.

Horvitz & Levy, Peter Abrahams and Joshua C. McDaniel;
Weston Herzog, Jonathon J. Herzog and Paul J. Shardlow for
Defendants and Respondents.

Theresa Williams was walking in a parking lot adjacent to an Albertson's store when a large plastic letter from the store sign fell to the ground near her. She sued Albertson's for negligence. The jury found Albertson's was negligent in maintaining the sign, but that the negligence did not cause any harm to Williams. Williams appeals, arguing that (1) the trial court erred in admitting certain expert testimony, and (2) the jury prejudicially engaged in misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We decline to adopt Williams's incomplete statement of the relevant facts, but rather summarize the facts in accordance with the general rule that an appellate court will view the evidence in the light most favorable to the judgment. (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 492, fn. 1.) In May 2012, during a windy day, a 3-foot-tall plastic letter "A" detached from the front of an Albertson's store, and fell thirty feet to the ground. The letter broke into pieces. A store manager went outside and saw one "big piece" in a shopping cart, and three other pieces on the ground.

Williams was standing in the vicinity where the letter fell. She told the manager the letter hit her foot. The manager asked if she was okay, and Williams replied that she "just got spooked." Williams then filled out a form about the incident, and in response to the question, "were you injured?" wrote "hit left foot and neck hurts."

In November 2013, Williams sued Albertson's for negligence and premises liability. She alleged Albertson's failed to adequately maintain its premises, and its "store sign fell onto and struck her body" causing her "severe personal injuries."

At trial, Williams's counsel proceeded on the theory that "either [Williams] was hit directly in the shoulder and the foot when [the letter] was coming down or her reactions were such that it created a whiplash like effect." Counsel argued the falling letter caused Williams to sprain her shoulder and develop fibromyalgia, and that she had sustained a brain injury from rotating her body in reaction to the falling sign.

On the stand, Williams testified she was not sure the sign hit her: "everything happened so fast that you don't actually know what happened," but she "thought it hit" her. She believed the letter hit her "shoulder, [] left thigh and leg . . . and actually both my feet." After the letter fell, she remained standing at the scene and talked with the customer next to her. She then went into the store, filled out a form about the incident, and did her shopping.

A surveillance video of the incident was played for the jury. The video shows Williams approaching the front of the store by foot. The letter then falls towards the ground and breaks into pieces. Williams stops and stands there, before turning to a bystander.

The jury found Albertson's negligent by a vote of 11 to 1. But, by a margin of 9 to 3, the jury found that the negligence was not a substantial cause of any harm to Williams. Williams moved for a new trial, arguing jury misconduct. The court found insufficient evidence of misconduct and denied the motion. Judgment was entered for Albertson's, and Williams timely appealed.

FACTUAL AND PROCEDURAL BACKGROUND

Williams raises two arguments on appeal: the trial court erred in (1) admitting the testimony of Albertson's expert

witness about the video of the falling letter; and (2) denying Williams's motion for new trial based on jury misconduct.

1. *The Undesignated Expert Witness*

a. *Trial Court Proceedings*

At trial, Williams called Brad Avrit, a civil engineer, as an expert witness. Avrit analyzed the video of the letter falling and concluded there was a "problem with the video" and "the motion sensing system, if it exists, is not operating properly." According to Avrit, the video showed "intermittent recordings with significant chunks of time missing." He testified that although the video appeared to show the sign "falling in front of her," the sign "most likely would have to have hit her" based on where one of the sign fragments landed.

After Avrit testified, Albertson's counsel filed a trial brief stating that it intended to call an expert witness, Motti Gabler, to rebut Avrit's testimony about the video system malfunctioning. Williams's counsel objected on the grounds that Gabler had only been designated as a percipient witness, not an expert witness. Williams's counsel also objected to two edited versions of the video of the falling letter that Gabler had altered by zooming in and slowing down. Although the video was listed on the joint exhibit list (Exhibits 102 and 103), Williams's counsel claimed the exhibits were never "provided" to him, but at the same time, acknowledged that they had been emailed to his office. The court allowed Gabler to testify.

Gabler testified that he saw no indication that the surveillance video system had malfunctioned. He concluded the system was "working exactly as it was intended."

b. *No Abuse of Discretion in Admitting Gabler’s
Testimony*

Williams argues the trial court abused its discretion in allowing Gabler, an undesignated expert witness, to testify at trial about the enhanced version of the video of the incident. We disagree.

The disclosure of expert witness testimony is regulated in Code of Civil Procedure sections 2034.010 et seq.¹ (*Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 906.) Section 2034.300 provides for the exclusion of testimony as a sanction when a party has “unreasonably failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260. [¶] (b) Submit an expert witness declaration. [¶] (c) Produce reports and writings of expert witnesses under Section 2034.270. [¶] (d) Make that expert available for a deposition. . . .” (Emphasis added.)

“Failure to comply with expert designation rules may be found to be ‘unreasonable’ when a party’s conduct gives the appearance of gamesmanship” (*Staub v. Kiley* (2014) 226 Cal.App.4th 1438, 1447 (*Staub*).) We review the court’s ruling on a motion to exclude expert testimony for abuse of discretion. (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 952.)

Williams does not dispute that her expert witness, Avrit, did not disclose any opinions about the functioning of the video surveillance system when he was deposed before trial. When Avrit testified for the first time at trial that the surveillance

¹ All further statutory references are to the Code of Civil Procedure.

system had malfunctioned, Albertson's sought to respond to this surprise testimony by calling Gabler to testify that the system did not malfunction. If anything, it was Williams's conduct, not that of Albertson's, that gave "the appearance of gamesmanship." (*Staub, supra*, 226 Cal.App.4th at p. 1447.) Accordingly, we conclude that Albertson's did not unreasonably fail to comply with expert designation rules, and the court did not abuse its discretion in allowing Gabler to testify.

Even assuming error, we conclude it was not "reasonably probable [Williams] would have obtained a more favorable result absent the error." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1286.) In her opening brief on appeal, Williams argues that Gabler's testimony about the "reliability of the doctored video" prejudiced her because the video distorted the jury's perception and made "it appear the sign did not strike" her. A video of the letter falling was played throughout trial—Gabler only slowed down the footage and zoomed in on the relevant action. This did not distort the evidence. We also observe that even Williams and her counsel acknowledged that the sign may not have hit her: Williams was equivocal as to whether the sign hit her, and her counsel's theory in opening argument was that *either* the sign hit her *or* her surprise at the sign falling caused her to react in a way that caused her injury.

Defendant does not contend on appeal that the Gabler videos itself were improperly admitted into evidence. Williams does claim on appeal—in her "Statement of the Facts"—that Albertson's "never disclosed" this video to her. The record shows (1) the videos were listed on the joint exhibit list, and (2) the videos were emailed to Williams's counsel before trial. Williams's counsel acknowledged at trial that he received the email with a

DropBox link to the video prior to trial, but objected that the DropBox link expired at some unknown point in time. Albertson's counsel's paralegal testified that she removed the videos at some point "for storage purposes off the Dropbox link," but wrote in her email to Williams's counsel, "Please let me know if you have any trouble accessing this link." Williams's counsel never replied to the email or otherwise responded stating the video was inaccessible. The trial court at least impliedly found defendant's counsel provided the video evidence to plaintiff's counsel. Substantial evidence supports that finding.

Williams further argues she was prejudiced because "there was no opportunity to prepare for rebuttal or retain a rebuttable expert witness." The record is quite to the contrary. The trial court gave Williams the opportunity to depose Gabler over the weekend at the expense of Albertson's, and offered to allow Williams to recall Avrit to respond to Gabler's testimony. The trial court also told Williams's counsel that the court would consider allowing Williams "to call any witnesses that were not on the witness list." Williams's counsel did not take advantage of any of these offers. Instead, plaintiff's counsel spent considerable time examining Gabler at an Evidence Code section 402 hearing outside the presence of the jury before the court made its ruling allowing Gabler to testify. Plaintiff's counsel referred to this examination as "in lieu" of a deposition. We find any error was harmless.

2. *Jury Misconduct*

Williams contends the trial court erred in denying her new trial motion. She argues that there was evidence that several jurors discussed the case during a break in deliberations and she

was prejudiced by this misconduct. We conclude the trial court did not abuse its discretion in finding no jury misconduct.

a. *Trial Court Proceedings*

Williams moved for a new trial on the sole ground of juror misconduct. In a supporting declaration, one of the jurors, Keri Dearborn, stated that nine jurors agreed from the start of deliberations that the falling sign had not caused harm to Williams. However, on the second day of deliberations, the jury was deadlocked on the issue of Albertson's negligence. During a lunch break, Dearborn overheard three jurors discussing whether Albertson's had been negligent. After lunch, the jurors voted again breaking the deadlock in favor of Williams. Nine jurors voted that Albertson's was negligent, and nine voted that the falling sign did not cause Williams harm. When polled in the courtroom, two additional jurors voted that Albertson's was negligent, raising the total "yes" votes to eleven.

In opposition to the new trial motion, Albertson's submitted the declaration of Emma de Goey, one of the three jurors Dearborn allegedly overheard discussing the case. De Goey said she had not discussed the case with other jurors outside of the deliberations. The trial court found that Dearborn's declaration was not "totally credible" and had been contradicted by another juror. The court found no "improper conduct" and denied the motion.

b. *No Abuse of Discretion in Denying the Motion for New Trial*

"The standard of review on a new trial motion alleging juror misconduct is abuse of discretion." (*Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1213.) "To the extent that the trial court confronted conflicting declarations in denying the new trial

motion, we affirm the trial court's factual determinations, whether express or implied, if supported by substantial evidence. [Citations.] . . . 'In our review of such order *denying* a new trial . . . we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.' [Citation.]" (*Sandoval v. Los Angeles County Dept. of Public Social Services* (2008) 169 Cal.App.4th 1167, 1176, fn. 6.) When the trial court has considered opposing declarations, we defer to the trial court's factual determination that no misconduct occurred. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.)

The court's finding was adequately supported by De Goe's declaration. Even if the trial court erred in finding Dearborn's declaration not credible, the alleged misconduct did not prejudice Williams. According to Dearborn, several jurors changed their votes to find that Albertson's *was* negligent. Because these jurors switched their votes in Williams's favor, even if improper discussions had occurred, Williams suffered no prejudice.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.